Software Rights Archive, LLC v. Google Inc. et al
Doc. 242

Exhibit 1

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STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STACIE SOMERS, on Behalf of Herself and All Others Similarly Situated, Plaintiff, -vs- APPLE, INC., a California Corporation, Defendant.	)	Case No.: CV 07 6507 HRL

DEPOSITION of GARY L. FRENCH, Ph.D., taken on behalf of Defendants at 555 California Street, 26th Floor, San Francisco, California, on Friday, April 3, 2009, commencing at 10:09 a.m. before LINDA VACCAREZZA, CRP, RPR, CLR, CSR NO. 10201

BARKLEY Court Reporters

GARY L. FRENCH,

having been duly sworn, by the Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION

BY MR. MITTELSTAEDT:

Q Okay. If you'd state your full name for the record, please.
A Gary Leslie French.
Q As I read your report, your opinion is that there are two approaches for demonstrating common proof of impact on the indirect purchasers: One is to show impact on the direct purchasers, and then show that they passed on some or all of the overcharge to indirect purchasers. And the other is to estimate the overcharge directly at the retail level.
Do I have that right?
A Yes.
Q In this case, have you actually undertaken either of those approaches?
A No. Not at the class certification stage, no.
Q In any other case, have you ever actually done either approach, as opposed to just

02:26 Q Do you know any way -- do you know any way to measure, in your regression analysis, for a coolness factor?

02:26 A In a regression analysis?

02:26 Q Right.

02:26 A No, you couldn't measure by regression a coolness factor.

02:26 Q Now, the fact that there's a feature or a function that increases the demand for a product, that's not anti-competitive by itself, is it?

02:26 A No.

02:26 Q You need something more for an economist to say a feature or a function is anti-competitive?

02:26 A Well, you need to show that -- in the context of the Section 2 or tying claim, you need to show there's market power, not just that demand was increased.

02:26 Q Well, you need to show more than that, right? You can have market power and have a feature in a product that increases the demand without violating the antitrust laws, right?

02:26 A Conceivably.

02:26 Q Well, not just conceivably but every day.

02:26 A Yeah. I mean, you can have legitimately obtained market power. And unless you do something

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA }
} ss.
COUNTY OF SONOMA }

I, LINDA VACCAREZZA, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 10201 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a).)

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1).)

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28.)

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

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of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1).)

Before completion of the deposition, review of the transcript [XX] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e).)

Dated: 04/06/09,

BARKLEY Court Reporters

Exhibit 2

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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COPY

THE APPLE iPOD iTUNES ANTI-TRUST LITIGATION, No. C-050037-JW(RS)

________________________________/

DEPOSITION OF ROGER G. NOLL, Ph.D.

Taken before EARLY K. LANGLEY, RPR, RMR

CSR No. 3537

September 19, 2008

Aiken Welch COURT REPORTERS

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appearing.

MS. SWEENEY: Bonny Sweeney from the Coughlin Stoia law firm representing the direct purchaser plaintiffs.

MS. ROACH: Paula Roach from Coughlin Stoia representing plaintiffs. 10:10

MS. ZELDES: Helen Zeldes from Zeldes & Haeggquist representing the indirect purchaser plaintiffs.

MR. MITTELSTAEDT: And Bob Mittelstaedt for the defendant with Jeff LeVee, Michael Scott and Carlyn Clause. 10:10

THE VIDEOGRAPHER: Would the counsel please state any stipulations or statements that they would like on the record at this time. 10:11

MR. MITTELSTAEDT: None.

THE VIDEOGRAPHER: The reporter may now swear the witness.

ROGER NOLL, Ph.D.

sworn as a witness,

testified as follows:

EXAMINATION BY MR. MITTELSTAEDT:

Q. Good morning. If you would state your name and business address, please.

A. My name is Roger G. Noll and I'm in the 10:11

little variation, there's only two or three product models, sometimes a simple little table will do it.

So, but in principle, it is normally the case that damages are estimated using a regression model. And I suspect that will happen here, but I don't know that until I see the data. 11:31

Q. Okay. Have you concluded that you can use a before-after method of determining whether there's damages and, if so, the amount without a regression analysis in this case? 11:31

A. No.

Q. Okay.

A. I mean, what I described in the before or after analysis is a method of estimating the damages that is -- can have an implementation of many forms. All right. 11:31

And it is -- it is normally the case that the implementation method is a price regression that attempts to take into account variation in price due to all of the factors that are likely to affect supply and demand and then see if there's anything left over that can be explained by the anticompetitive act. 11:31

Q. All right. Have you done enough work in 11:32

advantage. I don't know.

Q. Okay. Are you sure that the yardstick method can be implemented in this case?

A. As I have said in my report, that is the one I'm least happy about, all right, in that it requires identifying the appropriate comparative products. And my -- I believe that's -- that's the hangup, is identifying the appropriate benchmark products. 11:33

But, you know, as I've said in the report, there are some candidates out there. If the plaintiffs had completed the market correctly, then the most obvious candidates are the products that are the closest functionally to portable digital media players, but that are not in the same market. 11:34 11:34

Q. Okay.

A. And I also gave an explanation of why it's possible, although you normally don't do it, you might even be able to use products in the same market because of the effect that tying has in segmenting the market, so that even though in the absence of anticompetitive acts, all the products would be in the same market, the anticompetitive act may have reduced competition among portable 11:34 11:34

digital media players sufficiently such that you can actually use the -- some of the competitors in the portable digital media player market as a yardstick. So that's possible, but, again, it requires data that I'm not sure exists. 11:35

So, I would say that's a candidate, someone should pursue it, if they were going to estimate damages, but I have more doubts that that one will work than the other two.

Q. Have you done enough work to determine if the markup method can, in fact, be implemented in this case? 11:35

A. Well, actually, I'm not the one who did the work. I cited a paper that I found that was fairly recently written that -- that essentially does this. 11:35

Now, it doesn't have internal data, unfortunately. It has -- what they did is they tried to build up the cost.

Q. Okay. Can you just answer the question? And the question is: Have you done enough work -- have you seen enough work to determine if the markup method can, in fact, be implemented? 11:35

A. Yes.

MS. SWEENEY: Object. He was answering 11:35

just used it when I had dinner with them on Wednesday night.

Q. In reference to?

A. Oh, nothing to do with any of this. It had -- what were they referring to? 11:50

Q. Do you think the coolness factor affects demand for iPod?

A. I don't know even how to answer the question. I think in the sense that I need to back up. I'd have to know what you meant by it. 11:50 I mean, people have attachments to products, and a large part of what marketing is about is trying to build those attachments. Those -- those affect demand. But I'm having a hard time knowing how we would go out and measure units of cool -- 11:50

Q. Well, that was going to be my next question --

A. -- for a regression analysis.

Q. But the first question is: Do you think that type of attachment to a product is something 11:50 that affects demand?

A. Well, it affects demand but it affects it -- you can -- that's what determines elasticity of demand. All right. So you're out there estimating elasticity of demand and what's going 11:51

THE WITNESS: Okay.
MR. MITTELSTAEDT: Let's take a short break now.
MS. SWEENEY: Okay.
THE VIDEOGRAPHER: This ends tape No. 1 of the deposition Roger Noll. The date is September 19th, 2008, and the time is 12:01. 12:01
We are now off the record.
(Break taken.)
THE VIDEOGRAPHER: Test 1, 1, 2. 12:15
Stand by. On the record. This begins tape No. 2 of the deposition of Roger Noll. The date is September 19th, 2008, and the time is 12:16. We're back on the record.
BY MR. MITTELSTAEDT: 12:16
Q. For the before-after model, can you be any more specific as to what variables you're going to include in the regression analysis than to say as you do in the report, "product features, input cost and the stage of the product in its life cycle"? 12:16
A. Do you want specific examples of product features and input costs?
Q. I want whatever you are going to put in your regression analysis as a variable. 12:16

A. I don't know what I am going to put in my final regression analysis as a variable because I haven't collected the data to see what's significant and what isn't.

I can -- the -- the -- I think what you really want to know is what things might be tried as opposed to what's going to be in the final model because I have no idea what would be in the final model. 12:16

Q. What variables are you going to put in your various versions of your regression analysis for the before-after model? 12:17

A. Again, the -- I start off with the answer I've given several times.

They would be specific functions the product can perform, would be the first category, such as what specifically can you do with it, because that's changed over time. All right. 12:17

An iPod today isn't the same thing an iPod was in 19 -- or 2001. And as time has progressed, it's had greater and greater functionality, and, you know, like the introduction of Internet access, the adding of video, increases in memory size. 12:17

So, it's -- it's -- it's the -- it's 12:17

instead of a price estimate which you then plug into the Cornell model of imperfect competition.

Q. Okay. And have you performed that analysis in any case you've done?

A. I personally have not done it in a case. 12:46 I have done it in a paper. And I've seen it done twice by Dan McFadden.

Q. Okay. What paper did you do it in?

A. It's just -- the results of it are just in footnotes in two papers. I did it once in a 12:47 little paper I wrote a long time ago with Paul McAvoy on competition among natural gas pipelines and I did it again on -- in a paper about intellectual property rights --

Q. Okay.

A. -- which was about five or six years ago.

Q. After lunch I'll ask you to show me that in a minute.

A. Yeah. If I can remember the title of it looking at my CV and trying to remember what's in 12:47 papers by names. I'm not sure I can do it, but I'll try.

Q. Okay.

A. I know I can do the natural gas pipelines one, because it's the only paper I've ever written 12:47

case, then the total monopoly profits go up, if you can engage in tying.

Q. Okay. Have you made any analysis of the impact of the alleged tying arrangement on the price of music? The price of iTunes music? 14:24

A. I have done no analysis of the effects of the alleged tying. I don't have a merits conclusion. So I -- I haven't done it for the tied product or the tying product, though. This is not the liability phase. This is the class 14:24 certification phase.

Q. Is it --

A. I don't have a conclusion about what the effects on the price of anything were.

Q. Okay. Is it plausible that if the 14:24 plaintiffs were right that there was a tying arrangement, it would have caused the price of iTunes store music to drop?

A. Maybe, maybe not.

Q. Compared to the but-for world? 14:25

A. There's -- you can't -- you cannot -- there's no theoretic answer to that question. It's an empirical question. Maybe, maybe not. It depends.

Q. It depends on the results of a regression 14:25

curve effect. You don't have to separate out the magnitude of the cost differential and the number of people who experience it. What you have is the cumulative effect of those two things determining a change in the demand curve. 15:56

Q. So when you do your regression analysis, if you do it right, you'll come up with a certain amount of the iPod price that has not been allocated or attributed to some other variable, it will be sort of left over to your dummy variable 15:56 and then that dummy variable will reflect what you say is the price effect of -- of whatever wasn't measured in your various variables; is that right?

A. Well, I'm not sure it's going to be a dummy variable. You know, as I said earlier, the 15:56 effect can depend on the nature of the alternatives, and those may vary continuously.

Q. I don't understand that.

A. The magnitude of the lock-in effect in my expectation went down in September of 2007. So I 15:57 would -- I think a valid damage estimation would at least have to admit the possibility and estimate whether the anticompetitive harm was affected by the events of September 2007.

And that's what I meant. I mean what's 15:57

A. Oh, I'm sorry. I'm sorry. It's late in the day. Explain what we're after now.

Q. You understand that the purported class includes both direct consumers and resellers like Best Buy? 17:01

A. The wholesale market?

Q. Yes.

A. Yes. Remind me what I was asked again.

Q. Do you know whether or not you can use the same regression analyses for both? 17:02

MS. SWEENEY: Both being resellers and consumers?

BY MR. MITTELSTAEDT:

Q. Yes.

A. My best guess is there's going to be two 17:02 regression analysis models because obviously the wholesale price differs from the retail price.

What I -- what I need to know is how the wholesale market actually works. I need documents about Apple's pricing policy in the wholesale 17:02 market. I need transactions data in the wholesale market and how I'll go about doing it -- doing that part of the analysis would depend on those details.

Let's take the simplest possible case, 17:02

which I doubt that it's true, but let's assume that it's true. Assume that the wholesale market looks exactly like the retail market, that there's a posted price for each model of iPod that's 30 or 40 percent below the retail price and everybody can buy as much as they want at that posted price. 17:03

In that case, the -- a product-specific dummy variable whether the buyer was a wholesaler would be sufficient, right. But that's almost certainly not going to be true. It might be true. 17:03

But I suspect there are quantity discounts and advance purchase discounts, and, you know, special promotional discounts if you spend some money on advertising we'll pay some of it. So there's likely to be more complexity in the price 17:03 formation in the wholesale market than in the retail market in which case there will probably have to be two equations.

Q. And can you tell me anything more than -- more than what is in your report on what the 17:03 equation will look like for the wholesale --

A. Actually, if that's the case, it will look a whole lot like the one I just did which is static random access memory, static random access memory, which is a different kind of case. It's a 17:04

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, EARLY LANGLEY, a Shorthand Reporter, State of California, do hereby certify:

That ROGER G. NOLL, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 24th day of September 2008.

Early Langley

EARLY LANGLEY, CSR NO. 3537
State of California